SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1967.

No. 366

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AMERICAN INVESTORS FUND, INC.,

*Petitioner,*

v.

ROSALIND FOGEL and GERALD FOGEL,

*Respondents,*

and

GEORGE A. CHESTNUTT, JR., JOHN CURRIER, FRANK G. FOWLER, JR., WARREN K. GREENE, RICHARD W. RADCLIFFE, STANLEY L. SABEL, ELIZABETH SULLIVAN, FRANCIS L. VEEDER, AMERICAN INVESTORS CORPORATION, CHESTNUTT CORPORATION, THE FUND OF FUNDS, LTD., I.O.S., LTD. (S.A.) and JESUP & LAMONT,

*Defendants.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

# Supreme Court of the United States

October Term, 1967.

No.....

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American Investors Fund, Inc.,

*Petitioner,*

v.

Rosalind Fogel and Gerald Fogel,

*Respondents,*

and

George A. Chestnutt, Jr., John Currier, Frank G. Fowler, Jr., Warren K. Greene, Richard W. Radcliffe, Stanley L. Sabel, Elizabeth Sullivan, Francis L. Veeder, American Investors Corporation, Chestnutt Corporation, The Fund of Funds, Ltd., I.O.S., Ltd. (S.A.) and Jesup & Lamont,

*Defendants.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner American Investors Fund, Inc. prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit which summarily affirmed the decision of the District Court which had denied petitioner's motion in a stockholders derivative action for security for reasonable expenses, including legal expenses, under Section 627 of the

Business Corporations Law of New York, for an allegedly "pendent" state claim, or, in the alternative, to dismiss the state claim as not being properly "pendent" to purported federal claims.

## Opinions Below

The decision of the Court of Appeals was rendered May 8, 1967. It is unreported and is printed at App. p. 27a*. The memorandum decision and order of the District Court was filed March 30, 1967. It is unreported and is printed at pp. 25a-26a.

## Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c). Jurisdiction is further invoked under this Court's decision in *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541.

## Questions Presented

The first question presented is whether in a stockholder's derivative action plaintiffs are required in accordance with state law to post security for reasonable expenses, including legal expenses, in "pendent jurisdiction" cases, as well as in "diversity" cases as required by *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. 541.

The second question, in the alternative, is whether the state claim should have been dismissed as not deriving from a common nucleus of operative fact with the purported federal claims.

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* Pages of appendix, bound with this petition, are designated by letter "a".

The third question presented is whether the Court of Appeals properly affirmed summarily on motion the decision of the District Court, without full briefs and the record of the District Court before it, denying petitioner's motion for the relief in the first two questions.

## Statutes Involved

Section 627 of the Business Corporations Law of New York (9 McKinney's Cons. L. of N.Y. Sec. 627) provides:

> "§627. Security for expenses in shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor
>
> "In any action specified in section 626 (Shareholders' derivative action brought in the right of the corporation to procure a judgment in its favor), if the plaintiff or plaintiffs hold less than five percent of any class of the outstanding shares or hold voting trust certificates or a beneficial interest in shares representing less than five percent of any class of such shares, then unless the shares, voting trust certificates and beneficial interest of such plaintiff or plaintiffs have a fair value in excess of fifty thousand dollars, the corporation in whose right such action is brought shall be entitled at any stage of the proceedings before final judgment to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorney's fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which the corporation may become liable under this chapter, under any contract or otherwise under law, to which the corporation shall have recourse in such amount as the court having jurisdiction of such action shall determine upon the termination of such action. The amount of such security may thereafter from time to time be increased or decreased in the discretion of the court having jurisdiction of such action upon

showing that the security provided has or may become inadequate or excessive. L.1961, c. 855; amended L.1962, c. 834, Sec. 43, both eff. Sept. 1, 1963."

The Rules of Decision Act, 28 U.S.C. 1652, provides:

"§1652. The laws of the several states, except where the Constitution or treaties of the United States, or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Section 10(d) of the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1, et seq.), provides:

"(d) Notwithstanding subsections (a) and (b)(2) of this section, a registered investment company may have a board of directors all the members of which, except one, are affiliated persons of the investment adviser of such company, or are officers or employees of such company, if—

"(1) such investment company is an open-end company;

"(2) such investment adviser is registered under subchapter II of this chapter and such investment adviser is engaged principally in the business of rendering investment supervisory services as defined in said subchapter II;

"(3) no sales load is charged on securities issued by such investment company;

"(4) any premium over net asset value charged by such company upon the issuance of any such security, plus any discount from net asset value charged on redemption thereof, shall not in the aggregate exceed 2 per centum;

"(5) no sales or promotion expenses are incurred by such registered company; but expenses incurred in complying with laws regulating the issue or sale of securities shall not be deemed sales or promotion expenses;

"(6) such investment adviser is the only investment adviser to such investment company, and such investment adviser does not receive a management fee exceeding 1 per centum per annum of the value of such company's net assets averaged over the year or taken as of a definite date or dates within the year;

"(7) all executive salaries and executive expenses and office rent of such investment company are paid by such investment adviser; and

"(8) such investment company has only one class of stock outstanding, each share of which has equal voting rights with every other share."

## Statement

This petition seeks review of an order of the Court of Appeals which summarily affirmed the memorandum decision and order of the District Court denying petitioner's motion for a protective order under Rule 30(b) of the Federal Rules of Civil Procedure, or in the alternative, to dismiss the "pendent" state claims. The protective order sought to compel plaintiffs to furnish a bond in the amount of $100,000 under New York law as security for expenses and legal fees in this shareholders derivative action, or in the alternative to dismiss the state claim.

Petitioner is a New York corporation and is a "no-load" mutual fund (pp. 4a, 6a).

It is a registered investment company under the Investment Company Act of 1940 (the "Act"), and there is no allegation in the complaint that it fails to meet each and every requirement in the eight numbered subparagraphs of Section 10(d) of the Act (quoted *supra*, pp. 4-5).

Among these requirements is that of Subsection 10(d)(6) that any management or advisory fee charged shall not exceed one percent per year, as defined.

The complaint in paragraph "5(b)" correctly alleges that petitioner has paid investment advisory fees annually of 8/10ths of one percent on the first $50,000,000 of net assets, 6/10ths of one percent on the next $50,000,000, and 4/10ths of one percent on the next $100,000,000 (p. 16a). The record shows that at the time of the motion petitioner's net assets were approximately $110,000,000 (p. 9a).

Notwithstanding the fact that petitioner has always met the requirements of the eight numbered subparagraphs of Section 10(d) of the Act, petitioner has also complied with the provisions of Section 10(a) of the Act, which provides that not more than 60 percent of petitioner's directors may be "affiliated persons," as defined in the Act, instead of having only one non-affiliated director which is permitted to an investment company not charging more than a one percent advisory fee. Thus, it is doubly certain that the rate of advisory fee paid by petitioner is legal under the Act, since there is no limitation on such advisory fee where no more than 60 percent of the directors are affiliated, and, in any event, petitioner has paid less than the one percent fee which it could have paid had there been only one unaffiliated director.

There are no allegations in the complaint that petitioner does not have the proper number or percentage of unaffiliated directors. "Affiliation" is not mentioned. Hence, as a matter of federal law, the rate of the advisory fee is not justiciable under the complaint.

Plaintiff's original complaint, which was amended during the pendency of the motion, alleged in paragraph "1" (p. 14a):

"1. This action arises under the Investment Company Act of 1940, 15 U.S.C. Sec. 80 a-1, et seq. (the "Act") and common law principles. The jurisdiction of the court is based on the Act and on the principles of pendent jurisdiction."

Plaintiffs, therefore, clearly realized that their complaint was based on state law. There are no allegations of diversity of citizenship.

As is set forth below under "Reasons for Granting the Writ," petitioner contends that the only real thrust of the complaint is an action for violation by directors of fiduciary obligation under New York law. Petitioner further contends that the invocation of the Investment Company Act of 1940 is insubstantial at best, and in any event relates only to a portion of the complaint.

Following the making of the motion for security for expenses and legal fees under New York law, plaintiffs filed an amended complaint, amending only Paragraph "1" of the complaint quoted above, so as to delete the reference to "pendent jurisdiction" and "common law principles." (p. 25a)

Thus, the substance of the complaint remains the same after the amendment as it was before.

There are three entirely separate claims in the complaint, and the three claims are totally unrelated in law or in fact. After identification of the parties and an allegation of stock ownership in the first four paragraphs, paragraph "5", containing nine sub-paragraphs, attempts to set forth an action for violation of fiduciary duty under New York law.

A totally different claim is alleged in paragraphs "6" through "11". There the plaintiffs seek to allege that petitioner's agreements with its investment adviser are illegal

and void because the directors of petitioner are said to be under the domination and control of the investment advisers and the stockholders were not informed. The plaintiffs say that this constitutes a violation of Section 10(a) and Section 15 of the Act. There are no grounds or facts set forth to show such domination.

The third segment of the complaint, a third claim, alleges that payments by petitioner of brokerage fees to a brokerage firm were improper, although there is no claim that the brokerage paid was other than the customary brokerage, and there is no claim that it was unnecessary, or that petitioner engaged in "churning" its portfolio (paragraphs "12" through "20").

The state law claim culminating in the allegations of paragraph "5" is nothing more than New York boiler plate allegations of waste in violation of fiduciary duty. The second and third claims purport, in conclusory language, to state that the federal statute had been violated. However, there is no allegation in the second claim (paragraphs "6" through "11") that the directors of petitioner were not chosen in accordance with the Act, or that there were not the requisite number of unaffiliated directors. The third claim cannot really be said to allege any damage to petitioner, since there is no allegation of unnecessary brokerage payments, nor is there any allegation that petitioner paid excessive brokerage commissions.

Thus, the only claim in the complaint which alleges damage to petitioner, and for which plaintiffs derivatively seek recovery, is the first claim for violation of fiduciary duty in paragraph "5". Everything following that paragraph purports to set forth abstract and conclusory claims of illegality under federal law, thus affording a purported vehicle for federal jurisdiction, although without any showing of injury to petitioner.

The short moving affidavit by petitioner's Treasurer states facts tending to show that there is no common nucleus of operative fact for the State claim and the purported federal claims (pp. 4a-13a). It states the facts of the minute shareholdings of respondents, making mandatory the relief under Section 627 of the Business Corporations Law (p. 5a).

The affidavit outlines the spectacularly successful investment record of petitioner, one of the best of all the investment companies in the world for the last five years, according to a recognized statistical authority (pp. 9a-10a). It is shown that the appreciation in value per share of petitioner has been more than four times that of the Dow-Jones Industrial Average over a period of years, and that in 1966 when that average declined 18.9%, petitioner's share value appreciated 3% (p. 9a).

The affidavit emphasizes the fact that petitioner is a "no-load" fund (p. 6a). As such, it is not the object of Securities and Exchange Commission attack and congressional attention, since as the S.E.C. report to Congress of December 2, 1966 ("Public Policy Implications of Investment Company Growth", 89th Congress, 2d Session, Union Calendar No. 1046, House Report No. 2337, hereinafter referred to as the "S.E.C. Report") states (p. 53):

> "From the small investor's point of view the sales load is by far the principal cost of a mutual funds investment. Most mutual fund investors are small investors, and the 8.5 percent sales load that they normally pay is—assuming that the net asset value of the fund's shares does not change—almost 19 times their pro rata share of the customary annual advisory fee of one-half of 1 percent." (Footnotes omitted).

Thus, should Congress adopt a 5% limitation on "sales loads" as recommended by the S.E.C. Report, petitioner's annual advisory fee, beginning in the first bracket at

8/10ths of 1%, and now in the 4/10ths of 1% bracket, will continue to present only a fraction of the expense to investors of a "load" fund, even after future remedial action by Congress with respect to the "load" funds (pp. 8a-9a).

The affidavit requests security for reasonable expenses in the amount of $100,000, including the expenses petitioner will incur in reimbursing the officers and directors who are co-defendants (pp. 5a-6a, 13a).

The affidavit makes clear that the defense of the state equity claim will be detailed, massive and expensive, whereas the purported federal claims, since they involve wholly different facts and narrow legal issues, will be relatively less expensive to defend before a jury (p. 13a).

## Reasons For Granting the Writ

If petitioner is entitled to the protection of Section 627 of the Business Corporations Law of New York, which was enacted to prevent "strike suits" and to relieve corporations of the heavy burden of defending baseless actions brought for ulterior motives by persons with no real interest in the outcome, then relief must be granted on this petition, or it can never be granted.

This Court has held that in "diversity" cases, a federal court must apply a state security statute. *Cohen* v. *Industrial Loan Corporation,* 337 U.S. 541. As that case pointed out, if relief is not granted during the course of a derivative action, it will be too late after the action is successfully defended, because the corporation and the officers and directors whom it must indemnify will never be able to recoup the enormous expense of their successful defense. In effect, the basis of jurisdiction and the reason for relief were held to be the same.

One judge in the Southern District of New York has held expressly that the New York requirement for security for expenses must be applied in "pendent jurisdiction" cases as well as in "diversity" cases* Apparently, other courts have not passed on the question. Since this Court has never passed on the question, it ought to do so now, even in the absence of any express conflict among the circuits, since it is a question which will recur. Failure to apply the state security statutes will increase the flooding of federal courts with essentially state actions, which, as here, are garnished with various federal securities law labels as the ticket for admission to the federal court and the passport of evasion of well considered state statutes expressing the policies of the states.

The question will recur irrespective of any action by Congress to amend the Act and involves all federal statutes.

The Act expressly recognizes in Section 10(d) quoted *supra*, pp. 4-5, that a "no load" fund, such as petitioner American Investors Fund, which does not charge any sales load or commission, may pay an advisory fee of not more than 1% per annum of its net assets, even if only one director is "unaffiliated." If not more than 60% of the directors of an investment company are "affiliated persons," as that term is specifically defined in Section 2(a)(3) of the Act, there is no limit whatever on the amount or rate of the advisory fee in the federal statute.

The complaint is wholly silent as to the affiliation of directors, and it does not attack the truth of prospectuses and proxy statements showing petitioner has never had directors, more than 60% of whom were affiliated.

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* See *infra* p. 15. Another judge has followed this decision.

Thus, it is clear at the outset that a claim of an excessive fee, which the very terms of paragraph "5(b)" of the complaint show to be less than the only federal statutory maximum, cannot be entertained under federal law. The claim in paragraph "5" of the complaint, since it cannot allege a violation of federal law, is not, and can never be, anything more than a claim of violation of fiduciary duty by directors under New York corporation law.

That the real essence of the claim in paragraph "5" is a violation of state law, and state law only, makes it clear that this claim should never have been presented to a federal court, in the absence of diversity. Of course, had the claim been brought in the state court by these holders of approximately 50 shares out of 3,250,000 outstanding at the time this motion for security was brought, petitioner could have invoked Section 627 of the Business Corporations Law as a matter of right, and a New York court would have enforced its mandatory provisions (p. 5a).

Respondents recognized that their complaint was in essence one of New York law, since they expressly invoked in paragraph "1" of the original complaint "pendent jurisdiction" and "common law principles." (p. 14a)

This Court has recently reviewed the requirements for "pendent jurisdiction." In *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725, the Court stated:

> "The state and federal claims must derive from a common nucleus of operative fact."

The present case presents a complaint where the three claims are wholly unrelated. There is no "common nucleus of operative fact" among the three claims.

The complaint is a conglomerate. Nothing tending to prove or disprove the state claim of violation of fiduciary

duty with respect to the reasonableness of the advisory fee has any bearing whatever upon the second and third claims. The second claim herein (paragraphs "6" through "11"), is nothing but an abstract assertion that all of the directors are subject to "domination and control" (paragraph 8) and that they are "beholden" to the investment adviser for the "substantial emoluments derived from their positions" (paragraph "7"). There is not a single fact or "ground" alleged, as required by Rule 8 of the Rules of Civil Procedure, and nothing tending to show or to prove the first claim as to the unreasonableness of the advisory fee would have any bearing upon the second claim.

The third claim contained in paragraphs "12" through "20" is likewise unrelated to the first claim under New York law. That third claim merely alleges that petitioner has given brokerage business to a certain brokerage firm at the request of a very large shareholder of the Fund. There is no allegation that any of such brokerage business was unnecessary, or improvident, or that petitioner paid excessive brokerage fees. The third claim is nothing but a bald statement that it is illegal for petitioner to place brokerage business at the suggestion of a shareholder, followed by the further bald assertions that this constitutes "conversion" and a deprivation of benefits to petitioner.

Therefore, this conglomerate complaint is nothing more than an allegation that the advisory fees are unreasonable, to which the plaintiffs have seen fit to tack on highly speculative assertions as to the Act.

This Court said in *United Mine Workers* v. *Gibbs*, *supra* at 726:

> "Its [pendent jurisdiction's] justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal

court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64 (58 S. Ct. 817, 82 L. Ed. 1188). *Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.*" (Emphasis added, footnote omitted).

• • •

"Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals."

Since respondents expressly invoked "pendent jurisdiction" in their original complaint, and since their amended complaint makes no change whatever except to delete such reference in the first paragraph, the further statement of this Court in *United Mine Workers* v. *Gibbs, supra,* at p. 727 is especially significant:

"The question of power will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been properly assumed is one which remains open throughout the litigation. Pretrial procedures or even the trial itself may reveal a substantial hegemony of state law claims, or likelihood of jury confusion, which could not have been anticipated at the pleading stage. Although it will of course be appropriate to take account in this circumstance of the already completed course of the litigation, dismissal of the state claim might even then be merited. For example, *it may appear that the plaintiff was well aware of the nature of his proofs and the relative importance of his claims;* recognition of a federal court's wide latitude to decide ancillary questions of state law *does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case.* Once it appears that a

> state claim constitutes the *real* body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." (Emphasis added)

Two decisions in the Southern District of New York squarely support petitioner's position. Both cases involved mutual funds. A short, cogent opinion by Judge Edelstein carefully discussed and properly applied *United Mine Workers* v. *Gibbs, supra,* and *Cohen* v. *Beneficial Industrial Loan Corp., supra.* In *Mintz* v. *Allen,* 254 F. Supp. 1012, the court held (p. 1014):

> "Both as a matter of law and as a matter of policy the court finds that State security requirement should be enforced (as to state causes of action only) by the federal courts in pendent as well as diversity jurisdiction cases.[2]"

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"[1] Judge Weinfeld, relying on Phelps v. Burnam, 327 F. 2d, 812 (2d Cir. 1964) and Fielding v. Allen, 181 F. 2d. 163 (2d. Cir.) cert. denied, Ogden Corp. v. Fielding, 340 U.S. 817, 71 S. Ct. 46, 95 L. Ed. 600 (1950) has reached the same result. Kane v. Central American Mining & Oil, Inc. 235 F. Supp. 559, 567-569 n. 40 (S.D.N.Y. 1964). In both Phelps and Fielding however, jurisdiction over the non-Federal claims was based on diversity. In Kane, the argument urged in instant case was apparently not made."

Judge Bonsal has recently reached the same result in *Entel* v. *Allen* (64 Civ. 4048, S. D. N. Y., January 31, 1967) —— F. Supp. ——, reported in CCH Federal Securities Laws, ¶91, 886, expressly following *Mintz* v. *Allen, supra.*

The S.E.C. Report adds weight to petitioner's contention that only state law applies to reasonableness of advisory fees. It says (p. 139):

> "Plaintiffs' counsel were not unmindful of the likelihood of an adverse judgment, since each fully litigated case had resulted in a judgment for defendants. And under the courts' interpretation of *applicable State*

*law,* obtaining a favorable result was no easy matter. The most modest of settlements seemed preferable to the risk of a trial which was likely to result in an adverse decision." (emphasis added)

The S.E.C. thus expressly recognized that what is involved in mutual fund litigation concerning advisory fees is "applicable state law."

The Report also stated at page 133:

"In most cases settlements were reached which provided for some reduction in advisory fees to be charged in future years. In only three cases did the termination result from a judgment on the merits based on an evidentiary record developed in an adversary proceeding. Each of the three fully litigated cases (Meiselman v. Eberstadt, decided in May of 1961,[138] Saxe v. Brady, decided in September of 1962,[139] and Acampora v. Birkland, decided in July of 1963)[140] held that the plaintiffs had failed to prove the fees legally excessive and resulted in a judgment for the defendants.[141]"

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"[138] 39 Del. Ch. 563, 170 A. 2d 720.
"[139] 40 Del. Ch. 474, 184 A. 2d 602.
"[140] 220 F. Supp. 527 (D. Colo.)."
[141] Footnote omitted.

The *Saxe* v. *Brady* case, cited by the S.E.C., *supra,* contains a lengthy and thorough discussion of Delaware law. The only federal case cited by the S.E.C. applied Delaware law in the Colorado federal court.

Respondent's attorney, who verified the complaint and the amended complaint, is, of course, well aware that state law controls the gist* of this action and is likewise "well aware of the nature of his proofs and the relative im-

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* The present case contrasts with *J. I. Case Co.* v. *Borak,* 377 U.S. 426, where the gist of the complaint was a federally created right.

portance of his claims." *United Mine Workers* v. *Gibbs*, 383 U.S. at 727. At the University of Pennsylvania Law School Conference on Mutual Funds, held less than one month after he verified the complaint, Abraham L. Pomerantz, Esq. was a panel speaker. He is reported as saying (115 Univ. of Penn. L. Rev. 659, 753):

> "MR. POMERANTZ: I have had fourteen investment company cases and fourteen sets of depositions and/or cross-examinations of the independent directors, and in not one single case did any unaffiliated director ever respond 'Yes' to this type of question: When your fund grew from $100 million to $600 million, did you ever give any thought to making a comparison between your half of one per cent fees and somebody else's fees?
> No."

A few pages earlier (p. 740) Mr. Pomerantz had also recognized, in agreement with the S.E.C. Report (quoted *supra*, pp. 15-16), that "every stockholder's action charging excessiveness that has gone to trial has been nonsuited or dismissed * * *." These cases, of course, turned on what the S.E.C. called "applicable state law" (pp. 15-16, *supra*), and state law alone.

That the defense of this state law action will be equally successful is foreshadowed by the facts briefly outlined in the moving affidavit, paragraph 10 (pp. 8a-9a), showing the declining scale of advisory fees instituted when petitioner had barely crossed $10,000,000 in size.

But, in the meantime, petitioner is put to the expense of defending a state equity suit in the federal court, where plaintiffs have demanded a jury (p. 14a), without the protection of New York law where it is incorporated and where the federal forum is.

The mere fact that respondents have "jumbled" three wholly unrelated claims in a single count cannot permit them to escape New York law. In a diversity derivative action in which $100,000 security was upheld, Judge Friendly has said for the Court, *Phelps* v. *Burnham,* 327 F. 2d 812 (2d. Cir.) at p. 814:

> "... It is scarcely persuasive that, as appellant urges, the Complaint might have jumbled the two claims together; this might have made it harder to draw the order but would not have altered the essentials."

The artifice of jumbling state and federal claims in a single count should be no more successful in "pendent jurisdiction" cases than in "diversity" cases.

The "fourteen investment company cases" which respondents' attorney has brought (*supra,* p. 17), all of which must turn upon what the S.E.C. Report calls "applicable State law" (*supra,* p. 16) cannot have failed to inculcate that degree of forum awareness which *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64, sought to make supportive, rather than destructive, of state policy.

Until this Court at this stage of an action determines the important and unsettled questions presented, its decision in *Cohen* v. *Industrial Loan Corp., supra,* will remain only half effective. Transparently inappropriate federal labels will suffice to defeat state policy, to impose state law cases on federal courts, and to frustrate this Court's decisions.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be granted.

Dated: July 11, 1967

Respectfully submitted,

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